IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943.

No. 482.

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CHICAGO, SAINT PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, ET AL., *Appellants*,

*vs.*

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND CORNELIUS W. STYER, DOING BUSINESS AS NORTHERN TRANSPORTATION COMPANY, *Appellees*,

*and*

GLENDENNING MOTORWAYS, INC., *Intervener-Appellee.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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## BRIEF FOR APPELLEE, CORNELIUS W. STYER Doing Business as Northern Transportation Company

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## CORRECTIONS AND ADDITIONS TO APPELLANTS' STATEMENT OF THE CASE

We make the following corrections of certain inaccuracies and omissions in appellants' Statement of the Case:

1. On page 5, it is said:

> "Styer offered no evidence as to any operations during the 'grandfather' period from any Minnesota point to any Minnesota point."

Styer offered evidence of bona fide operation during the "grandfather" period over the whole of each of the three routes involved and including all intermediate points on each route. The Commission found that Styer was in bona fide operation on June 1, 1935, to and from these intermediate Minnesota points. Whether the evidence sustains that finding is one of the principal issues of the case.

2. On page 5, appellants also say:

> "Styer made the claim through counsel, and testified and presented evidence in support of such claim, that his eastbound 'grandfather' operation from South Dakota to Minnesota consisted of an irregular route operation to widely scattered Minnesota points, none of which were on the regular 'grandfather' routes granted by the Commission" (R. 97-98, 102-106).

The statement conveys the erroneous impression that the eastbound irregular route operation was the *only* eastbound operation claimed. Later appellants so argue.

Styer made claim to two types of operations. The first was the ordinary regular route operation over three routes with Minneapolis and St. Paul, Minnesota,[1] the easternmost terminus, and Mitchell, South Dakota, the western terminus, serving all intermediate points on the routes in both Minnesota and South Dakota, both westbound and eastbound.

The second operation claimed was characterized by Styer as an "irregular route" or "territorial" operation from a large area in South Dakota to any point in a described territory in Minnesota. Styer claimed he was entitled to a certificate authorizing *both* types of operations, viz., regular route and "irregular route" or "territorial." Contrary to appellants' statement and later argument, he did not claim that his eastbound operation was solely territorial in nature nor

[1]Hereinafter called the Twin Cities.

did his claim *exclude* the eastbound movement upon his *regular routes.*

The Commission found that he was in bona fide regular route operation, including all intermediate points, in both directions, i. e., eastbound and westbound, stated that his eastbound irregular route operation was such that it might be warranted in granting irregular route or territorial authority. Because, however, after June 1, 1935, his eastbound operations of an irregular route nature had evolved into a regular route operation in the main, the Commission denied the irregular route authority.

3. On page 5, appellants state that they filed a petition for reconsideration of the order of Division 5 of the Commission. For purposes later appearing, we ask the Court to note that appellants did not ask the Commission for a further hearing or for a rehearing, which, if requested and meritorious, would have been granted. It is our point that appellants cannot now complain they have been denied a "full and fair" hearing (page 13, Appellants' Brief) when, with opportunity provided by the Commission's rules, they might have received it.

4. Both Appellee Styer and the Intervener, Glendenning, pleaded and submitted evidence to the lower Court in support of the claim that appellants, by their delay in bringing this action for seven months after the Commission's denial of their petition for reconsideration, during which time a certificate of public convenience and necessity had been issued to Styer and Styer had sold his business and rights to Glendenning for $66,000.00, are guilty of laches fatal to their claim here.

In connection with that issue, we add the following to the Statement of the Case:

Pursuant to the "Agreement of Lease," including option

for sale later exercised by Glendenning, and pursuant to the applicable statute requiring Interstate Commerce Commission approval of the transfer of the certificate and properties, Styer and Glendenning applied to the Commission for approval of that transaction.

Hearing upon that application was held before the Commission's Examiner on October 31, 1942, two days before the service of a summons in this case upon Styer. Neither Glendenning nor Styer had any knowledge of this action heretofore.

On March 13, 1943, and while this case was pending before the lower Court after trial, the Commission, in its order of that date (R. 80), found that the sale by Styer to Glendenning was consistent with the public interest (R. 88) and entered its order for approval.

The lower Court, sustaining the Commission's order for other reasons, found it unnecessary to consider our plea of laches. We may urge it in this Court upon the authority.

*U. S. vs. American Ry. Express* (1924), 265 U. S. 425, 68 L. Ed. 1087.

It may assist the Court to here identify by numbers the routes described on the maps—Styer Exhibit Nos. 1 and 2 (R. 126-A, 90) and the map attached to the appellants' brief. Throughout the Commission's and lower Court's decisions, the routes involved herein are designated as Routes 1, 2 and 3. These route numbers may be identified by reference to the Commission's decision (R. 8, paragraph 2) and Appendix (R. 16 and 17). For purposes here, it is sufficiently accurate to say that the topmost route appearing on the maps running west from the Twin Cities to Huron, South Dakota, and thence south to Mitchell, South Dakota, is Route No. 2.

Route No. 1 is the "middle" route extending west from the

Twin Cities duplicating Route No. 2 as far as Winthrop, Minnesota, extending south from Winthrop to New Ulm, Minnesota, thence west through Brookings, South Dakota, to Huron, South Dakota, and thence south to Mitchell, South Dakota.

Route No. 3 is the route appearing nearest the bottom of the maps, extending from the Twin Cities south through Mankato to Fairmont, Minnesota, thence through Sioux Falls, South Dakota, to Mitchell, South Dakota.

## SUMMARY OF ARGUMENT

### "In the 'Grandfather' Case."

1. There was evidence fully sustaining the Commission's finding and conclusion that Styer was in bona fide operation on June 1, 1935, over the whole of the two regular routes, Nos. 1 and 2, including the intermediate points in Minnesota, thus satisfying the statutory command.

2. As to eastbound operations from South Dakota points to Minnesota points, the evidence clearly shows that Styer was in bona fide operation over the whole of Routes 1 and 2 as a *regular route* operator, serving both eastbound and westbound, and to and from all intermediate points on said regular routes without reference to whether such intermediate points were in Minnesota or South Dakota; that *in addition* to such full regular route operation, Styer claimed that he was operating both an *additional* South Dakota origin territory and an *additional* large Minnesota territory embracing points of origin and destination not located on his regular routes. This *additional* operation Styer himself characterized as an "irregular route" or "territorial" operation and claimed that his certificate, *in addition to regular route operations to and from all intermediate points in both direc-*

*tions,* should also include the authority for this "territorial" operation. Whether, under the facts, this portion of his eastbound operation was of the character Styer ascribed to them, was for the Commission to say. The Commission said that these eastbound irregular operations, separate and apart from the eastbound on his regular routes, were, in the early stages, of an irregular route or a territorial nature but that the evidence of his operations *since* the "grandfather" date showed transportation, in great part, between points upon his regular routes only. The Commission thus denied his claim to irregular route authority and granted, and properly so, the *regular* route authority to serve all intermediate points *both* westbound and eastbound.

3. The Commission's disregard of the stipulation of the parties was fully within its power under Section 208 (a), and, at all events, the parties to a proceeding involving the public interest, here a public transportation service, could not so tie the hands of a public regulatory body.

4. Even absent evidence of shipments to these intermediate route points, the statute empowers the Commission to authorize service thereto under Section 208 (a), U. S. C. 49, 308 (a).

5. Appellants are guilty of laches. They inexcusably delayed assertion of their action for seven and one-half months after the denial of their petition for reconsideration by the Commission. During the delay and after the issuance of a final certificate to Styer, Styer sold his business, properties, and the rights in question to Intervener Glendenning for some $66,000.00. Styer and Glendenning changed their positions during the delay such that an adverse decision here would produce inequity and injustice.

## ARGUMENT

**There was evidence fully sustaining the findings and decisions of the lower Court and of the Commission holding that Styer was in bona fide operation on June 1, 1935, to and from the intermediate route points lying in Minnesota.**

### The Lower Court's Findings and Decision Upon This Issue.

The determining portions of the lower Court's findings and decision are not fully quoted by appellants. They are:

> "4. There was no evidence adduced before the Commission that prior to June 1, 1935, Styer had transported any commodities to or from intermediate points in Minnesota on routes 1 and 2. The evidence was that prior to that date Styer had transported commodities from the Twin Cities (St. Paul and Minneapolis) in Minnesota to Huron and Mitchell in South Dakota over routes 1 and 2, had served intermediate points in South Dakota thereon, and had transported commodities from South Dakota points to points in Minnesota which were not on routes 1 and 2.
>
> "5. There was evidence before the Commission sufficient to justify the inference that prior to June 1, 1935, Styer was able to serve intermediate points in Minnesota on routes 1 and 2, and had held out service to such points" (R. 66—Findings of Fact).

In its decision, the lower Court said:

> "The broad question which the Commission was required to determine in the 'grandfather' proceeding was: What grant should be made to Styer under the 'grandfather' clause of §206 (a), in order to assure him a substantial parity between his future operations and his prior bona fide operations? See *United States vs. Carolina Freight Carriers Corp.*, 315 U. S. 475, 481. The Commission was not compelled to limit Styer to the exact pattern of his operations prior to June 1, 1935, and, in determining the scope of his 'grandfather' rights, it could take into consideration the service which he was

offering, as well as that which had actually been performed by him, prior to that date. *United States vs. Carolina Freight Carriers Corp., supra,* pages 483-484" (R. 61).

And again:

"It must be true, however, that the Commission, in determining the nature and extent of the 'grandfather' rights of a carrier in a particular case, is not required to do so with mathematical precision, and that, within reasonable bounds, its estimate of the character and scope of the carrier's bona fide operation on and prior to June 1, 1935, must be accepted by the courts, which cannot substitute their judgment for that of the Commission" (R. 62).

The Court then quoted the Commission's long established rule:

"The Commission has, in effect, ruled in similar proceedings that proof of actual operations as a common carrier to and from termini and *some intermediate points* on a regular route, coupled with evidence of a holding out of service and of a willingness and ability to serve *all points* on the route whenever shipments are offered, will justify a finding of bona fide operation to and between all points on the route. See *Nevitt Common Carrier Application,* 4 M. C. C. 298, 299-300; *Consolidated Freight Lines, Inc., Common Carrier Application,* 11 M. C. C. 131, 136; *Knaus Common Carrier Application,* 20 M. C. C. 669, 671; *Los Angeles-Seattle Motor Express, Inc., Common Carrier Application,* 24 M. C. C. 141, 145; *Tarbet Common Carrier Application,* 31 M. C. C. 63, 66-67. In the instant case, it is apparent that the Commission regarded the proof of actual service between termini and to intermediate points in South Dakota, together with the evidence which tended to prove that Styer was offering and was able to serve intermediate points, whether in Minnesota or South Dakota, on the 'grandfather' routes, as sufficient to justify the grant which it made to Styer. Proper deference must be paid to the Commission's interpretation of the law which it enforces, *Gregg Cartage & Storage Co. vs. United States,*

316 U. S. 74, 88, and, if there is any warrant in the record for the judgment of the Commission, it must stand. *Rochester Telephone Corp. vs. United States*, 307 U. S. 125, 145-146. We think that the Commission's determination that Styer was entitled to the rights granted because of his bona fide operations as a common carrier on and prior to June 1, 1935, did not amount to an abuse of power" (R. 62 and 63). (Our emphasis.)

The above are the principles invoked and applied by the lower Court upon the issue of the nature of the evidence which warranted the granting of authority to serve the intermediate points upon these routes. Whether the points lay in Minnesota or South Dakota was of no consequence.

Upon the same issue, the Commission found:

"When applicant started his own operation he utilized two trucks. On April 9, 1935, he added two tractor and semi-trailer units. On June 1, 1935, he operated no other equipment. There is no doubt that applicant transported commodities of a general nature between Minneapolis and St. Paul, hereinafter called the Twin Cities, within which term we shall also include South St. Paul, Minn., on the one hand, and, on the other, Brookings, Huron and Mitchell, S. Dak." (R. 9, Commission's Report).

The above findings substantiate the Commission's grant of authority to transport between the *termini* of Styer's routes. This finding is not attacked, hence virtually conceded.

Upon the question of intermediate point service upon Routes 1 and 2, the Commission found:

"Prior to June 1, 1935, applicant served the intermediate points on routes 1, 2, 4 and 5 of Brookings, Iroquois, Forestburg and Madison. Applicant does not claim the right to transport interstate shipments from the Twin Cities to points on his routes in Minnesota, but claims that such points were served eastbound from South Dakota. Although the proof of service at intermediate points on the above routes is not impressive,

> when considered in connection with the fact that operations by applicant were instituted only 2 months prior to the statutory date and the testimony of applicant that he did not limit his service to terminal points but held out service at all intermediate points and actually solicited such business, we are convinced that he should be authorized to serve all intermediate points on routes 1, 2, 4 and 5, and that a restriction to serve certain intermediate points in one direction only would make the authority granted unnecessarily complicated and it will not be imposed" (R. 10 and 11, Commission's Report).

The correctness of the findings of the Commission and of the lower Court that Styer should be authorized to serve intermediate points on these routes *in South Dakota* is not questioned and hence virtually conceded.

With respect to the remaining intermediate points, those lying upon the routes in Minnesota, the Commission took a realistic view of the facts. It recognized that on April 1, 1935, two months prior to the "grandfather" date and at the threshold of his venture, Styer designed and projected a business which encompassed operation over the whole of these routes with service to and from all points thereon, terminal and intermediate. The Commission found that he did not limit or confine his proffered service to terminal points. It found that he held himself out to serve all intermediate points and actually solicited business to and from such points.

**The Record Upon This Issue and Argument Thereon.**

This finding is amply supported by the record. Styer testified:

> "Between April 1 and June 1, 1935, my facilities were such as to permit carrying shipments to the intermediate points not covered by Exhibit 3. There was actual space in my trucks which would have allowed me to ac-

cept, carry and deliver shipments to these intermediate points had I received any during the period prior to June 1, 1935. Never at any time did I intend or offer to the public simply a non-stop operation between the Twin Cities and Huron prior to June 1, 1935" (R. 93).

Styer's statement concerning the intermediate points "not covered by Exhibit 3" was meant by Styer to include *all* intermediate points on all routes—even though those points were not named in Exhibit 3. Exhibit 3 (R. 131-132, 127) covers the period from April 1 to October 15, 1935, and sets forth in great part South Dakota points. The "partial abstract of Exhibit 3" (R. 132) sets forth the Minnesota points served during that period. His statement that he had space to carry any proffered shipments "to or from intermediate points" not covered by Exhibit 3 refers to other intermediate points not named in Exhibit 3 whether in South Dakota or Minnesota. The points not there named, of necessity, included all South Dakota *and Minnesota* intermediate points not there set forth.

At no time did Styer offer or intend to offer "simply a non-stop operation." A non-stop operation implies an operation between terminals only, not to, from, or between intermediate points on the routes.

And again:

"The drivers were instructed to solicit business from *all* towns through which they passed, to solicit freight in *either* direction" (R. 94). (Our emphasis.)

"On and prior to June 1, 1935, I solicited business for intermediate points on the regular routes I operated over. I contacted personally quite a few shippers" (R. 92).

"It was my purpose from the beginning to solicit and render service to the intermediate points. What I attempted to do was get a truck service comparable to that that Crabb had been giving. It was a daily service to a number of points in South Dakota; to any of the points along the routes. We accepted any freight we were able

to get from the time we started. We solicited freight for all points along the route. Because of the various contacts at some of these towns, we got much more freight there. I was born at Huron and was well-acquainted there and consequently Huron developed faster than some of the other points, but at no time did we turn down freight for any of these points along the routes in South Dakota. I am referring to the towns shown by Exhibit 5" (R. 93).

All of his sworn testimony stands uncontradicted.

To us it has always been perfectly clear that Styer, in this testimony, was referring to *all* intermediate points and without reference to whether those points lay in South Dakota or Minnesota. There were, as a matter of fact, some small South Dakota points which were not named in Exhibit 3 and which, prior to the critical date, he had not served. He had not "served" them in the sense that he had not picked up or delivered a shipment at or to such points. In his testimony there was no occasion for him to distinguish the intermediate point operation as between South Dakota and Minnesota points.

At all events, there is not one word in such testimony indicating that he was referring to South Dakota points only or, conversely stated, that when he said "intermediate points" he was *excluding* the Minnesota points upon his regular routes. He was, of course, referring to intermediate points upon all three routes. He was making no conscious distinction between Minnesota intermediate points and South Dakota intermediate points. When he said prior thereto that he solicited business for intermediate points on his regular routes "that I operated over" (R. 92), he was not referring, even by inference, to South Dakota or Minnesota intermediate points singly. He was referring to both. When he instructed his drivers to solicit business "*at all towns through which they passed* * * * in either direction" (R. 94), he was making no distinction concerning the state

in which such intermediate points lay. He meant precisely what he said, viz., *all* intermediate points upon the routes, whether in Minnesota or South Dakota. He was engaged in interstate commerce and so far as his business was concerned, it made no difference whether the revenues originated at or out of a Minnesota or South Dakota intermediate point.

Nevertheless, out of this testimony, appellants would have the Court believe that Styer was there referring, when he mentioned "intermediate points," to South Dakota points only and to the utter exclusion of Minnesota intermediate points. We submit that there is no basis in the ordinary interpretation of the English language for such argument and when all other facts and circumstances are considered, no basis or reason exists for such a position.

Appellants seek to interpret his testimony so as to leave the inference that he was attempting to emulate Crabb's service and that Crabb's service embraced South Dakota points only. (From the Twin Cities.) Actually no special or other inquiry was made as to whether Crabb's service embraced Minnesota and South Dakota points or South Dakota points only. It is true that Styer speaks of Huron, South Dakota, as the point where his business developed more rapidly than elsewhere—a natural statement in view of not only the fact of the matter but because also he was talking about South Dakota points as well as Minnesota points.

None of these isolated remarks upon which appellants seem to hang much of their case can overcome the effect of the general statements of Styer which, of necessity, contemplated *all* intermediate points whether in Minnesota or South Dakota. When at the outset of the quoted testimony that he says it was his purpose to "solicit and render service to intermediate points," there is nothing in this record before or after which would warrant the argument that he was re-

ferring to South Dakota points only and to the exclusion of Minnesota points. At a later point in the testimony he said:

"We accepted freight for all points along the route" (R. 93); that his facilities were such that he could accept, carry and deliver shipments to "intermediate points not covered by Exhibit 3."

The argument in our favor is crowned by his last statement that at no time did he intend or offer "a non-stop operation" meaning to the exclusion of all intermediate points.

If there should be any doubt about the proper interpretation of this testimony, the lower Court wisely and in accordance with proper principles of the law, said:

> "The Commission was free to place its own interpretation upon his testimony as to the extent of the service tendered" (R. 60).

The lower Court states that it was "probable" that Styer might have been referring to South Dakota points only because "his tariffs apparently covered no other intermediate points on his routes" (R. 60).

The Court, however, clearly resolved the matter by stating in substance that the Commission must be free to weigh the evidence and that the Commission's estimate of the character and scope of the operation within reasonable bounds should be accepted by the Courts.

We believe that the Court was influenced by a fact that the Commission more fully understood and appreciated. The "tariffs," of which the Court speaks, was not a tariff in the present day sense. The time was before regulation. The Court's reference is to Exhibit 5 (R. 134, 93). This exhibit was merely a card which contained the names of certain South Dakota towns and rates thereto from the Twin Cities only. It was "used by J. W. Crabb for service into South Dakota" (R. 93), before Styer started into business[2] (R.

[2]Styer had previously worked for Crabb.

93). It was circulated by Styer's Twin Cities terminal connection—The National Truck Terminals, Inc. This terminal company furnished dock space, pick-up and delivery service, and solicitation to and for all carriers connected therewith. The card (Exhibit 5) was, of necessity, circulated by that terminal company, on behalf of Crabb and Styer *among Twin Cities shippers.* Neither Crabb nor Styer had intrastate rights in Minnesota and could not transport shipments from the Twin Cities destined to a Minnesota point. They could accept, in the Twin Cities, only shipments which moved into South Dakota or shipments received by them from connecting carriers at the Twin Cities, which shipments originated without the state of Minnesota and were destined either to Minnesota points or to South Dakota points.

Twin Cities shippers, therefore, amongst whom this card was circulated, could ship South Dakota shipments only over Styer's line. Clearly, therefore, there was no reason why Crabb or Styer should circulate in the Twin Cities a card naming Minnesota points intermediate upon their routes. Such effort could have gotten them no business because they could not have accepted the shipments because of lack of intrastate authority to do so.

Styer solicited "various truck lines serving points east of the Twin Cities" (R. 94). East of the Twin Cities included Chicago, Milwaukee, Akron, Ohio; Oshkosh, Wisconsin; New Haven, Connecticut; and many others appearing in Exhibit 3 (R. 127).

The Commission, we submit, with its daily acquaintance with this type of fact situation, was in much better position than the Court to understand and evaluate the significance of the circulation of Exhibit 5. Its circulation had little, if any, bearing upon the interpretation to be placed on Styer's testimony, viz., whether he was talking about South Dakota points only or whether he was talking about all in-

termediate points upon the routes. The inclusion of Minnesota intermediate points upon such card would have been meaningless.

Thus, the Commission had ample basis in the record to find that Styer had been but two months in business, did not at any time limit his service to terminal points and had held out service to all intermediate points, including Minnesota points, and had actually solicited such business. In the short space of time between the beginning of his venture and the "grandfather" date, he could not reasonably be expected to have initiated actual shipments to or from all intermediate points on his routes (R. 92). The absence, however, of shipments to these intermediate points makes him nonetheless a carrier thereto—nonetheless in bona fide operation thereto. It may well be that the Omaha Railroad passes through Podunk, Minnesota, for two months without picking up or delivering a shipment yet no one can contend that the railroad was not in bona fide operation to that point. It was ready, willing and able to serve it and held itself out to do so and would stop there tomorrow to deliver a shipment. The principle here is not different. They are both public carriers.

## The Commission's Rule and Reasons Therefor.

The lower Court announced and applied the rule the Commission has long followed respecting the "grandfather" authority respecting intermediate points upon a regular route.

Where proof of bona fide operation between termini and some intermediate points is, as here, undoubted, the Commission has viewed the applicant's operation as an endeavor to serve a *route*. Significantly in the "grandfather" clause itself, Section 206 (a), the statute speaks of routes—not points.

The reason for the Commission's position is well stated in *Tarbet Common Carrier Application,* 31 M. C. C. 63, at 66 and 67. In that case the applicant could show no transportation during the "grandfather" period between St. Louis, Missouri, and Indianapolis, Indiana, a segment of the longer route from Muncie, Indiana, to St. Louis. The applicant, however, rendered a daily service from Muncie and St. Louis through Indianapolis. The Commission said:

> "To require an applicant under the 'grandfather' clause to prove service between every combination of points sought in the application would not only prove an insuperable burden but would result in restrictions which would choke the development of motor carrier operations over the routes which a carrier serves, and thus prevent the development of an efficient and economical transportation system contrary to the national transportation policy as expressed in the Act. We are of the opinion that such restrictions should not be imposed."

The wisdom and justice of this rule is hardly to be argued. It was not the intent of Congress under the "grandfather" clause that the Commission should be compelled to grant certificates authorizing service only to those intermediate points to or from which a carrier could produce a receipted freight bill evidencing such transportation. If that rule prevailed, transportation chaos would result. It would mean that carrier Jones would be authorized to serve points A, C and D—all on the same route; that carrier Smith, operating over the same highway, would be authorized to serve points B, E and F, and that carrier Brown could serve points G and H—all on the same highway. Such a pulverization of "grandfather" rights is far beyond the intent of Congress. We cannot easily imagine a railroad carrier service which stops at every other point only, even though its trains pass through them daily.

The Commission also refused to impose a "one-way" service to these intermediate Minnesota points and this notwithstanding Styer's claim or stipulation (R. 11). The lack of transportation efficiency in a "one direction" movement is apparent. It promotes the ultimate in transportation waste. In these days of scarcities of gasoline, tires, steel, etc., or at any time, such restrictions do not make transportation sense. Most important of all the restrictions here contended for by the appellants run counter to the national transportation policy. An efficient and economical transportation system cannot be achieved by imposing restrictions which prevent good public service. It is the Commission's duty, under the policy, to promote the inherent advantages of motor transportation service—not to deny them.

The exercise of the discretion to impose or refuse to impose all such restrictions is for the Interstate Commerce Commission. It is the exercise of an administrative discretion. It will not be disturbed by the Commission so long as the Commission stays within the bounds of its statutory powers.

*Rochester Telephone Corp. vs. U. S.*, 307 U. S. 125, 59 Sup. Ct. 754.

*Kansas City So. Ry. Co. vs. U. S.*, 231 U. S. 423, 58 L. Ed. 296.

*U. S. vs. Carolina Freight Carriers Corp.*, 315 U. S. 475.

*Federal Radio Commission vs. Nelson Bros., etc.*, 289 U. S. 266, 276, 277, 77 L. Ed. 1166.

## Response to Appellants' Argument.

The question of bona fide operation is one of fact and the conclusion must be drawn from all of the facts or circumstances of the case. Appellants disregard this view and seek to isolate certain of the Commission's statements and build an argument thereon.

Appellants say (page 17) that the Commission stated that the proof of service at intermediate points was "not impressive" and then point out that there was no proof of any "service whatsoever" to intermediate Minnesota points, either westbound or eastbound, prior to June 1, 1935. There were shipments from South Dakota points to Redwood Falls and Marshall, Minnesota, on Route 2 during the "grandfather" period for which Styer had no bills or manifests (R. 105). Styer explained the reason for the absence of these bills (R. 99).

Appellants' statement that there was no proof of service to these intermediate points ascribes a meaning to the word "service" which we deny. By "service" to a point, appellants apparently mean to say that the proof must show a pick-up or delivery of freight to an intermediate point in order to sustain "grandfather" rights. The Commission's statutory duty here is to determine whether an applicant was in bona fide operation over the route. We do not agree that proof of bona fide operation must rest solely in a showing of the actual receipt or delivery of freight at a certain point. In the sense made pertinent by the statute, Styer was in bona fide operation to all such intermediate points.

Appellants further claim that there was no evidence that Styer held himself out to serve these intermediate points (page 17). We shall not here repeat the testimony concerning solicitation by Styer and his truck drivers at these points and in both directions. This is the purest kind of holding out.

Appellants further claim that Styer testified concerning this solicitation before he amended his application to exclude the Minnesota points. They urge that his "direct testimony specifically disclaimed any 'grandfather' rights to serve westbound intermediate points" (page 17). Styer did not, by direct testimony, *disclaim* such "grandfather" rights, and appellants do not point to the record where such may be found. He did not, at a later period in the testimony, deny or qualify any of his previous statements of facts. In short, his later amendment did not deny the facts concerning solicitation or holding out. No such earlier testimony was ever later repudiated, as appellants claim (pages 18 and 19).

Appellants argue that Styer's holding out to serve these intermediate route points without a showing of transportation of shipments to or from such points runs afoul of the principles announced in *McDonald vs. Thompson*, 305 U. S. 263, 266, wherein the Court held that the bona fide operation contemplated by the Act required a showing of actual service rather than potential or simulated service, and that a showing of mere ability to serve was insufficient. The principle is mentioned in subsequent cases.[3] None of the prior decisions bear upon the fact situation here present. In each of them, the "grandfather" carrier was an "irregular route" or "territorial" carrier, handling special commodities requiring special transportation treatment. The instant case, in the respect under discussion, deals with regular routes and the transportation of general commodities in a manner similar to railroad carriage. The prior decisions deal with a different kind of service than here presented.

Further, the principle cannot apply in the instant case because Styer's trucks physically operated through these intermediate points daily. In the cited case (*McDonald v.*

[3]Alton R. Co. vs. United States, 315 U. S. 15; U. S. vs. Carolina Freight Carriers Corporation, 315 U. S. 475, 15 U. S. Sup. Ct. Rep. 722; Loving vs. United States, 32 Fed. Supp. 464.

*Thompson, supra*) and others, the claim of bona fide operation was unsupported and unaccompanied by any actual physical operation of the equipment in or out of the involved territories during the "grandfather" period. Styer did something more than to merely claim orally that he was entitled to serve these intermediate route points because he held himself out. There was an *actual* physical movement of the trucks through these points. He had initiated a route service, and his trucks moved over the routes and through these points daily. The service was present and the mere failure to have been tendered a shipment does not disprove its availability.

Appellants also argue that mere physical operations through these intermediate points is insufficient to establish "grandfather" rights, citing two Commission cases. In the *Gill* case, 29 M. C. C. 475, Gill proved undoubted bona fide operation between terminal points. Because the "grandfather" clause provides for a certificate to a carrier if he was "in bona fide operation over the route or routes within the territory claimed," Gill then contended that he had established a route and that under the statute the Commission was compelled to grant him all intermediate points without proof of service to them or intention to do so. The Commission directed attention to Section 208 (a) which requires the Commission to specify in certificate "intermediate points, if any" and said,

> "In our opinion, we are clearly directed to determine what intermediate points an applicant under the 'grandfather' clause should be authorized to continue to serve, depending on the facts in the particular case, and this has been our consistent practice" (476).

The cited case establishes no rule except that each case must be determined upon its own particular facts and circumstances. The conclusion is to be drawn from all the facts

of the case. In the instant case the "mere physical operation" through these intermediate points was accompanied by the launching of business in the first instance which embraced all points upon the routes involved. Such was not present in the Gill case.

*Denver-Chicago Trucking Company*, C. A. A., 27 M. C. C. 343, cited by appellants, is not applicable. There the applicants had, in a prior informal proceeding, claimed certain points in Illinois and Iowa as intermediate points upon the route between Chicago and Denver. At the hearing, however, they admitted that they had abandoned all service over the routes upon which these points were located. At the hearing they sought to be authorized to serve these points as "off route" points. The Commission denied the authority, first, because appellants have served them in the past as intermediate points upon routes now abandoned, and, second, because they were too far removed from the principal Chicago to Denver route to be properly considered "off route."

Appellants further argue that authority to serve these intermediate points would "vastly increase" the operation he was conducting on the "grandfather" date, thus increasing competition to them. This is claimed to be contrary to the claim to this Court in *Crescent Express Lines, Inc., vs. U. S.*, 88 L. Ed. Adv. 143. Parenthetically, it would be somewhat difficult to imagine that a beginning truckline, hauling LCL freight only, is in serious competition with these large railroads. The answer, however, is that the Commission's order does not increase operations not existing on the "grandfather" date. The "operation" over the routes was conceived by Styer in good faith on April 1, 1935. At that time he launched his project and was transporting freight daily over these routes for the two months preceding June 1, 1935. In other words, on June 1, 1935, the operations of which the appellants complain were existent and had been in operation

for the two preceding months. On June 1, 1935, Styer had already established himself as a "railroad competitor." The Commission's order did not permit him to *increase* competition except in so far as any competitor may increase his tonnage or revenues from the business upon the route already established. This, of course, is favored by the Act because Congress provided that the Commission should not attach any limitations to certificates which would restrict the carrier's right to add to his equipment and facilities as the development of his business and the demands of the business required. Section 208 of the Act, 49 U. S. C., Section 308.

## Eastbound Operations.

Applicant's entire argument upon this issue is based upon two false premises.

The first, contrary to appellants' statement, (page 23) is that Styer's evidence did *not* show that "the *only* eastbound service he was holding out or rendering during the 'grandfather' period was an irregular route service to many widely scattered points in Minnesota, etc." (Our emphasis.)

On April 1, 1935, Styer indisputably launched operations over three regular routes. The service he contemplated and thereafter performed was both westbound and eastbound. Moreover, operations over "regular routes," unless specifically restricted, imply transportation in both directions. The Exhibit 3 shows that Styer transported traffic in both directions prior to the "grandfather" date. (Exhibit 3, R. 90—R. 127, 128, 90.) For example, the first shipment shown on Exhibit 3, in April, 1935, is Minneapolis to Mitchell, South Dakota. The third shipment is Mitchell to Minneapolis and so on throughout the exhibit. For the two months prior to June 1, 1935, Exhibit 3 shows that Styer transported twenty-four shipments eastbound from Huron to Minneapolis and

St. Paul or South St. Paul (the Twin Cities area), and twenty shipments from Mitchell eastbound to the same Twin Cities area. This constitutes almost one shipment per day moving east to the Twin Cities area only—exclusive of other Minnesota points of destination.

The above represents admitted and undisputed movements of traffic eastbound between points on regular routes. The westbound transportation is more voluminous and is not attacked.[4] Both establish regular route operations in both directions.

Appellants attempt to read Styer's eastbound *regular route* movement out of the case.

The facts, the actual transportation performed, show movements over the routes and between route points in both directions and thus dispose of the argument.

The statement of claims appearing in the colloquy of counsel (R. 97) is to the same effect.

> "Mr. Janes: But do you claim rights in South Dakota, when you pick up commodities in South Dakota, to deliver those commodities in South Dakota to points in Minnesota *on those routes?* (Our italics.)
> Mr. Moore: Yes."

An understanding of the facts can leave no confusion concerning either eastbound regular or irregular route service.

One of Styer's problems was that of "balanced traffic," i. e., equal loadings in both directions. The westbound traffic predominated (From the Twin Cities). (R. 103 and 190.) To avoid and lessen empty eastbound mileage, it was necessary that, *in addition* to his route points in South Dakota, he establish a larger South Dakota area as an *origin* territory for the movement of goods eastbound into Minnesota. This South Dakota to Minnesota traffic moved to a

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[4]Shipments vary from a few hundred pounds to a few truckloads at one time (R. 191).

large number of Minnesota points between, on, and off his regular routes (R. 190 and 191). He named some twenty-seven points in Minnesota to which he had delivered shipments originating in this South Dakota area (R. 125). The goods included potatoes, farm produce, canned goods, construction machinery and supplies, building supplies and materials, printing presses and household goods (R. 11, Commission's order).

Speaking of Minnesota as a destination territory, he said, "We wanted it as a territory to be operated *in conjunction* with our regular route operations" (R. 104). (Our italics.)

The lower Court quoted Styer's testimony in full. We reproduce it here in part only:

> "I claim to have a regular operation and an irregular operation in Minnesota * * * I claim to have regular and irregular operations of general commodities. The regular operation as indicated by the routes shown on this map are the routes over which our trucks go daily and that service is given. * * * The irregular operation, for example, would be a shipment for Albert Lea (Minn.) where we would not go unless we had a shipment. In that nature it is irregular. The regular operations are more or less on a fixed time schedule. That is the bulk of our operations. The irregular operation is only supplemental to our principal operation. It is principally for back haul out of South Dakota" (R. 58, 59).

Mr. Styer further stated, "It is my contention that prior to June 1, 1935, and between June 1, 1935, and April 1, 1935, I transported shipments from South Dakota to points and places in Minnesota or from points and places in Minnesota other than the Twin Cities to South Dakota" (R. 99, 100).

At the time of his application and upon the hearing before the Commission, he believed that the nature and scope of his total operations were such to entitle him to a certificate (1) as a regular route carrier between all points on his routes,

whether in Minnesota or South Dakota, (2) and, in addition, as an irregular route carrier between points and places in a South Dakota territory and between points and places in a large Minnesota territory. The Commission held that his irregular route or territorial authority might be properly granted under the evidence, but that the proof of his operations since June 1, 1935, showed that his South Dakota to Minnesota business had evolved considerably into traffic between the points on his routes. The regular route authority granted would, therefore, more nearly fit his then operations.

The Commission recognized, without effort, that the irregular route operations Styer claimed to have were in addition to the regular route operation. In its order (R. 11) after disposing of the question of regular routes and intermediate points thereon, it said,

> "*In addition* to the operations conducted over regular routes described above, applicant also claims to have been engaged in the transportation of general commodities over irregular routes between points in that part of South Dakota described in his South Dakota application on the one hand and on the other, points in Minnesota" (R. 11). (Our italics.)

When it is made clear that Styer was claiming, and believed he was proving, two types of operation, entitling him to both types of authority, the Commission's order withstands appellants' attack. The Commission properly granted regular routes with service in both directions. Styer asked for irregular route authority between points and places in Minnesota and South Dakota located in "territories" and lying beyond his regular routes in both states. The Commission denied him the irregular route authority.

Thus appellants' argument is based upon false premises. The eastbound irregular route operation was not the only eastbound service performed.

The result therefor of which appellants complain, does not exist. There was no conversion of an irregular route operation into a regular route operation. The latter existed independently of the claimed irregular return or eastbound movement. Under these facts, there can be no conflict with the *U. S. vs. Maher,* 307 U. S. 148. Maher conducted an irregular route service during the "grandfather" period, filed his application, thereafter abandoned that type of service, and without authority commenced a new and different type of operation, viz., regular route operation. In the instant case, Styer, on the critical date, performed a regular route service and continued to do so at all times. He believed and attempted to persuade the Commission that, apart from his regular routes, his eastbound service between territories in Minnesota and South Dakota was such that it also entitled him to an irregular route authority. This was denied him.

**The Statute Empowers the Commission to Authorize Service to Intermediate Minnesota Points.**

Because of ample evidence of bona fide operations sufficient to sustain the Commission, we are not compelled to wholly rely upon the argument to follow. It has, however, a sound basis in the plain language of the statute, and standing alone, if need be, could be determinative of the case.

The proposition is: Even if the evidence of bona fide operation were wholly absent, the Commission is empowered by Section 308 (a) to require Styer to serve these intermediate Minnesota points. Such is the holding of a three judge statutory court in the Oregon District. *McCracken vs. U. S.,* 47 Fed. Supp. 444 (D. C. Ore.). The lower Court in the instant case rejected this contention holding that Section 208 (a) (U. S. C. 49, 308 (a)) did not confer such power in a "grandfather" case. It held, however, that in the "Public

Convenience and Necessity" case the Commission, without doubt, possessed such powers. In this section of our brief, we discuss the "grandfather" case only.

Section 208 (a) (49 U. S. C. 308 (a)) provides:

> "Any certificate issued under *section 206 or 207* shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, *at the time of issuance* and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, *including terms, conditions, and limitations as to the extension of the route or routes of the carrier,* and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require." (Our italics.)

We invite attention first to the opening words of the section. They refer specifically to certificates issued under Section 206—the "grandfather" clause, and, in addition, to certificates issued under Section 207—the "public convenience and necessity" requirements.

Secondly, the quoted section provides that the Commission may attach these conditions at the time of the issuance of the certificates. Such was done here.

It is always difficult to avoid the impact of plain and clear ambiguous language. Taken as a whole, or piece by piece, the language clearly shows that Congress gave the Commis-

sion the power to attach any terms, conditions, or limitations which, in the Commission's judgment, the public convenience and necessity required. The purpose of the section was to make the public interests and necessities paramount at all times. Congress believed the Commission, even after hearing, should have the power to use terms, conditions, and limitations which would meet the then requirements of the public.

It may be argued that the "terms, conditions, and limitations" are words of limitation and that the Commission, therefore, might condition or limit the certificate to be issued to the end only of granting *less* than the evidence might warrant. It was the lower Court's view that "grandfather" rights, being in the nature of a privilege, and to be strictly construed against the applicant, cannot be expanded by the Commission under the power in Section 308 (a).

The argument, however, overlooks a special inclusion in the quoted section, as follows:

> "Including terms, conditions, and limitations as to the extension of the route or routes of the carrier. * * *"

This inclusion empowers the Commission to compel a carrier to extend his route. It may say to the carrier, "Your regular route terminates at Mitchell, but it happens that there are a dozen small points beyond Mitchell which need your service. You serve them." If he may be compelled to extend a route, with its attendant expense of running trucks through them daily, it must surely be said that the Commission is empowered to compel him to serve a few intermediate points upon his already established route through which his trucks daily run to reach terminal points. The power to compel the greater necessarily includes the power to compel the lesser.

The counterpart of such power as affects railroads may be

found in Part One, Section 1 (21). A hearing is not made compulsory in either section.

Present the power, the wisdom of the matter is for the Commission—not the Courts.

The lower Court quotes the *McDonald* case, *supra*, and *Gregg Cartage & Storage Company vs. U. S.*, 316 U. S. 74, 83. These decisions view the "grandfather" clause as conferring a special privilege and indicating that it should be extended only to carriers plainly within its terms. Something of the same attitude is expressed in *Crescent Express Lines, Inc., vs. U. S.*, 88 L. Ed. Adv. 143, wherein the thought is expressed that Congress did not intend, by the "grandfather" clause, to provide more competition than already existed.

The response is that the Commission has not here granted Styer "grandfather" rights beyond the reasonable limits of proof. It followed a long established and proper rule wherein authority to intermediate route points, although not served on the "grandfather" date, if a part of a route and other intermediate points were served, would be granted, as a part of the full route authority, *intermediate point* if the evidence showed that the carrier had held himself out to serve all intermediate points and was able to do so. The application of that principle does not amount to an unwarranted expansion of the "grandfather" clause.

The Commission had the power, under Section 208 (a) (49 U. S. C. 308 (a)) to authorize the service to these intermediate Minnesota points even if proof of bona fide operations had been absent. It used it wisely.

*McCracken vs. U. S., supra,* supports the position announced above. We note that appellants declare it to be erroneous but do not attack the decision itself. The facts of the two cases are comparable. The lower Court in that case squarely held that Section 308 (a) empowered the Com-

mission to compel the carrier to serve intermediate route points to which no service had been shown during the "grandfather" period.

Appellants argue that the Oregon District Court overlooked the fact that express power, in different language, was given the Commission in Part One (21) to compel railroads to construct extensions. They claim that such power was not given in Part Two, applicable to motor carriers. We have already pointed out that Section 308 (a), in our opinion, was intended to be the counterpart of Section 1 (21), Part One. Part Two, as we view it, was intended to be a complete act, embodying the lessons learned from a piecemeal railroad regulation over a long period of years. Also we see no reason why Congress should deal differently with motor carriers than with railroads. Both are public utilities, and if the public need requires, both should be compelled to fulfill the public's need.

Appellants also too greatly emphasize their position as "parties" to a "grandfather" case before the Commission. The "grandfather" case essentially concerns the Commission and the applicant. Protestants, appellants here, are not parties to the same proceeding as are adversaries in private litigation over private rights. In such position, they are not entitled, as a matter of law, to object to requirements imposed by the Commission upon another carrier in the public interest. We understand that this subject is to be treated in full by another appellee.

## The Stipulation.

Appellants argue that Styer, by himself and through counsel, by stipulation in the "grandfather" case and by amendment in the public convenience and necessity case, withdrew from the Commission the power to make such disposition of the question of such intermediate Minnesota points as it deemed warranted by the evidence or in the public interest. They claim (page 12) that the stipulation and amendment had the effect of withdrawing that issue from the case.

The difficulty with appellants' argument is fundamental. Where a controversy embraces a matter of public interest, public right, or public policy, the law is clear that the Court may disregard stipulations of the parties.

*St. Paul vs. Chicago, etc., R. Co.*, 139 Minn. 322, 166 N. W. 335.

*Mills vs. Bd. of Commrs.*, 35 Idaho 7, 204 Pac. 876.

*Lockhard vs. People*, 65 Colo. 558, 178 Pac. 565.

*In re Dardis' Will*, 135 Wis. 457, 115 N. W. 332.

We need only state that a matter before the Interstate Commerce Commission under the Motor Carrier Act is one of public interest. The very essence of the law, apart from regulatory features, is public convenience and necessity. There are, in a real sense, three parties to a proceeding before the Commission, viz.: the applicant, the Commission, and the public. If protestants are parties, there are four. The applicant and the protestants could not stipulate away the power or duty of the Commission to protect the public or to discharge any of its statutory duties. They could not in any way tie its hands in the performance of its statutory functions.

In the public convenience and necessity case, the stipulation took the form of an amendment to the application.

Whatever the form, the principle still applies. If the Commission were bound strictly by the contents of an application or became bound by virtue of amendments thereto, which deleted certain segments of route or certain points, the result would be this: every applicant carrier would apply for the *profitable* points of origin and destination of freight and thus avoid the burden incident to service to smaller localities. We insist that Congress did not intend this result, and the Commission is empowered to avoid it—whether pleasing to operators or not.

Appellants further argue that Section 207 (a), U. S. C. 307 (a), provides that the Commission is empowered to grant the whole or any part of an "application" and deduce therefrom that it is without power to grant authority beyond the application in amended and final form. This view is too legalistic. It emphasizes the literal language of the statute to the exclusion of the context and purpose of the Act as a whole. It disregards Section 308 (a) empowering the Commission to add terms, conditions, and limitations deemed desirable to the public interest.

Appellants contend that the result of the stipulation was to deny them a full and fair hearing, claiming that they were deprived of the opportunity to introduce evidence.

The answers are three:

1. No error is here assigned to the effect that appellants were deprived of a full hearing or deprived of any constitutional rights. Lacking any such assignment, the Court will not consider the plea.

2. The point cannot be raised here because it was not raised before the Commission. Appellants petitioned to the full Commission for a reconsideration of the case upon the record there made. There was no petition for further hearing. The Commission's rules provide that a party may

ask for further hearing after Division decision.[6]

After Division 5's order came down, and if it were apparent to appellants that they had been denied the right to be fully heard on any issue, they should then have requested a further hearing for purpose of introducing any evidence they may have had.

3. The constitutional point was not raised in the lower Court.

The appellants' failure to here assign the point as error, their failure to request a hearing before the Commission when opportunity was provided, and their failure to raise the same before the lower Court, deprives the point of consideration in this Court.

The authority cited by appellants, as we read them, do not hold that the Commission is bound by stipulations in public proceedings. The Commission may receive stipulations. It may consider them, but it is not bound by them. The disposition made by the Commission of the stipulations in this case will not bring about the dire results appellants picture on page 13.

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[6](a) In General. A petition seeking any change in a decision order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

(b) Rehearing or Further Hearing. When in a petition filed under this rule opportunity is sought to introduce evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

**In the Public Convenience and Necessity Case, the Commission Was Warranted by the Evidence and the Power in the Statute to Grant Authority to Serve the Intermediate Minnesota Points on Route 3.**

The Commission, as noted, granted authority to serve intermediate Minnesota points on Routes 1 and 2 under the "grandfather" clause application. Under that application, it denied authority to serve the intermediate Minnesota points on Route 3 (Exhibits 1 and 2, R. 126-A and 90). In the public convenience and necessity case, the Commission granted authority to serve intermediate points on Route 3 and it is this grant of which appellants complain.

Route 3 is the southernmost route from the Twin Cities to Mitchell, South Dakota, and return. The principal intermediate point is Sioux Falls, South Dakota. Because Sioux Falls is South Dakota's largest center, much of the evidence centered about the convenience and necessity for service thereto. The evidence supporting the grant of authority to Sioux Falls, to the intermediate South Dakota points between Sioux Falls and Mitchell, was abundant and is not here attacked (R. 190 to 195), and Exhibits 3 (R. 127, 90), 7 (R. 135, 94), 14 (R. 165, 96), 17 (R. 167, 101), 18 (R. 169, 101), 19 (R. 171, 101), 20 (R. 176, 101), 21 (R. 181). The cited exhibits show extraordinary growth and voluminous tonnage over the three-year period following June 1, 1935, thus indicating the public's need for the service.

The Commission had ample evidence before it concerning the need of service at many of the intermediate points upon the route. The issue with the Commission was whether the remaining intermediate points, located in Minnesota, should be included in the authority or a restriction imposed which would increase "empty miles" to the carrier and deny the public an existent service. It deemed it to be in the

public interest to include all intermediate points.

Appellants emphasize that the "public witnesses" referred to need for Styer's transportation to South Dakota points only. It must be remembered that their businesses are located in the Twin Cities and that the only interstate transportation material in this proceeding was interstate, viz.: Minnesota to South Dakota and return. Movement of goods originating in their plants in the Twin Cities destined to Minnesota points are intrastate in nature and immaterial to the issues. Direct proof of the need for interstate service to these Minnesota points from the east must come from Chicago, Milwaukee, or other eastern centers. Witnesses from such far off points are not easily accessible for hearings of this nature.

Appellants place entirely too much emphasis upon the argument that authorities are to be granted from "point to point" to the exclusion of consideration of a "route." Even though the Commission must name intermediate points in its certificate, the "grandfather" clause, the source of "grandfather" authority, authorizes certificates to those who were in "bona fide operation over the route or routes or within the territory. * * *" No reference is made to points. If the Commission is to follow principles which will ultimately "bring about a national transportation system," as the national transportation policy requires, 49 U. S. C., Section 1 (301 and 901) it should, as it did here, avoid the splitting of routes into many parts—to be served by many carriers.

The lower Court adequately disposed of plaintiff's argument upon this phase of the case (R. 64). Its view accords with the fundamental principle relating to public utilities, viz.: the public interest is paramount, the carrier's interest is secondary.

## Appellants Are Guilty of Laches.

In affirming the Commission's order, the lower Court found it unnecessary to consider the pleas of laches asserted by Appellee Styer and Intervener Glendenning. We may urge the point here under authority of *U. S. vs. American Ry. Express* (1924), 265 U. S. 425. This phase of the case will be fully presented by Intervener Glendenning. Our comment, therefore, will be brief.

The pertinent facts are: on April 6, 1942, the Commission denied appellants' petition for reconsideration. No action having been commenced, and in its ordinary course, the Commission issued a certificate on July 11—some three months after the last Commission action. Prior thereto, Styer and Glendenning had negotiations concerning a purchase and sale (R. 76). After the issuance of the certificate to Styer and after Glendenning independently verified its contents, negotiations were commenced in earnest. They resulted in an "Agreement of Lease" (R. 30, 73—Exhibit A to Styer's answer, paragraph one) including an option to purchase (at R. 35, paragraph eight) dated September 22, 1942—over two months after the issuance of the certificate. There followed application by both parties to the Commission for temporary authority in Glendenning to operate Styer's properties and a supplemental lease (Exhibit A1 to Styer's answer, R. 47, 74), the exercise by Glendenning of his option to purchase on October 23, 1942 (R. 49, Exhibit A2, 74), an amendment to Glendenning's application to the Commission for lease approval so as to request approval of the purchase (R. 74, 75) and a hearing before a Commission Examiner on October 31, 1942 (R. 75).

Styer was served with summons in this action on November 2nd or 3rd. He first heard of this action on October 31st (R. 79).

The appellant railroads had three months in which to present this action before the issuance of the certificate (July 11). It was not brought within that period. When the certificate was issued Styer regarded it as final (R. 73).

Equally as important, the appellant rested another 3½ months after the issuance of the certificate (July 11 to October 31) before bringing the action. In the meantime, and on September 22nd, Styer had made a favorable sale and Glendenning had obligated himself to the extent of $66,000 before either of them had any knowledge that the original rights would be assailed in an action of this kind.

On March 13, 1943, the Commission found the transfer from Styer to Glendenning to be in the public interest and gave most adequate reasons therefor (R. 80 through 88).

The law respecting laches is familiar to the Court. The question is one of fact.[5]

> "They all proceed upon the theory that laches is not like limitation, a mere matter of time but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property or the parties."
>
> *Galliher vs. Cadwell*, 145 U. S. 368, 36 L. Ed. 738.

In *Penn Mutual Life Insurance Co. vs. Austin*, 168 U. S. 685, the Court said:

> "Where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exhaust its equitable powers in order to save him from the consequences of his own neglect."

Pertinent here is the following:

> "The requirement of diligence, and the loss of the right to invoke the arm of a court of equity in case of

[5] Laursen vs. O'Brien (C. C. A. 7), 90 Fed. (2d) 792.

laches, is particularly applicable where the subject matter of the controversy is a public work." *Ibid.*

Appellants' delay has always remained unexplained and unexcused.

During the delay, Styer changed his position so that adverse decision upon the merits of the Commission's order will greatly prejudice him. He expended moneys to build up his Sioux City, Iowa, business (R. 71-72). He endeavored to develop business at the Minnesota points upon the routes granted (R. 72). Thereafter he borrowed $6,000 from his brother and gave these rights as security. Before doing so, he was advised by counsel and the Commission's regional Minneapolis office that the Commission was "definitely final."

In addition, and while appellants slept upon their rights, Styer perfected a favorable sale to Glendenning receiving Glendenning's promise to pay him $51,485.57 for his trucks and equipment and $15,000 for his rights here assailed. The sale preserved to him the rights for which he is promised $15,000 by Glendenning. Such sum is the sum total of almost eight years of effort.

Both Glendenning and Styer have so changed positions during the unexplained delay that if the rights were now set aside, it would produce the greatest injustice and inequity to each of them. In a most real and genuine sense, there came into the existence during the delay the "intervening rights of third persons." (*Penn Mutual Life Insurance Co. vs. Austin, supra.*) These would be destroyed if the Court should now find the Commission's order unsupported or unlawful. Such would be of most serious consequence both to Glendenning and Styer, and the net result would be injustice, not justice.

## CONCLUSION

As urged in our motion to affirm, we continue to insist that the questions raised by appellants are not substantial. They involve the weighing of the evidence by the Commission and the exercise of an administrative discretion pursuant to full and clear statutory power.

There was ample evidence in support of the Commission's disposition of the issues before it. The stipulations of the parties, in so far as material, could not, as a matter of law, tie the hands of the Interstate Commerce Commission.

At all events, the unexplained delay in commencing this action to review the Commission's order, and the events transpiring between the termination of Commission proceedings and the service of summons herein revealing undisputed changes of position by Styer and Glendenning, should bar appellants' right to assert the cause. Any other result would produce injustice.

Respectfully submitted,

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